

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31877
)
 MICHAEL D. BUNNELL) **BOARD DECISION**
) (Precedential)
)
From dismissal from the position) **NO. 96-08**
of Correctional Administrator)
with the Department of)
Corrections at Sacramento) June 4, 1996

Appearances: Rothchild & Wishek, Michael Rothchild, Esq., on behalf of appellant, Michael D. Bunnell; Nossaman, Guthner, Knox, & Elliott, by Patricia Lee Connors, Esq., on behalf of respondent, Department of Corrections.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted the Department's Petition for Rehearing in the appeal of Michael D. Bunnell (appellant). Appellant was dismissed by the Department of Corrections (Department) from the position of Correctional Administrator at Deuel Vocational Institute (DVI) at Tracy, effective August 5, 1992.

Appellant's dismissal was based upon allegations that, inter alia, appellant had removed and destroyed documents from an inmate's file, misused public funds by authorizing cosmetic dental work for an inmate, condoned inmate violence, and gave favorable treatment to certain inmates.¹ Upon the commencement of the

¹A complete statement of facts is contained in the attached Proposed Decision of the ALJ.

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administrative hearing, appellant moved to suppress evidence obtained by the Department through a wiretap of a phone, which wiretap, appellant contended, violated state and federal laws. During the pendency of the proceedings before the Board, criminal proceedings were commenced against appellant involving the same conduct and evidence. On January 17, 1994, the Third District Court of Appeal held that the wiretap evidence was obtained in violation of the federal wiretapping law and ordered the contents of the unlawfully intercepted communications suppressed, as well as any other evidence which the trial court determined was derived from the unlawful interception. Bunnell v. Superior Court (1994) 21 Cal.App.4th 1811. On November 15, 1994 and February 6, 1995, the San Joaquin County Superior Court issued orders suppressing evidence of tapes and transcripts, physical evidence, witness testimony, and documents derived from the unlawfully intercepted communications.

Following the superior court's final determination, the ALJ issued a Proposed Decision holding that principles of collateral estoppel required suppression in this proceeding of all evidence suppressed by the superior court in the related criminal proceeding. In addition, the ALJ concluded that the remaining, untainted, evidence offered by the Department was insufficient to warrant holding a hearing on the merits, and ordered the adverse action of dismissal revoked. The Board adopted the ALJ's Proposed

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Decision on September 19, 1995. On December 19, 1995, the Board granted the Department's Petition for Rehearing to consider whether the exclusionary rule applied in this case and, if so, whether any other evidence existed to warrant holding a hearing on the merits.

After a review of the oral and written arguments of the parties, the Board adopts the attached ALJ's Proposed Decision as its own, to the extent it is consistent with this decision. In addition to the reasons stated by the ALJ, the Board considers the additional arguments presented by the parties on rehearing and concludes that principles of collateral estoppel apply to this case for the reasons stated below.

ISSUES

1. Whether the Department is collaterally estopped from relitigating before the Board the admissibility of evidence held inadmissible by the Third District Court of Appeal and the San Joaquin County Superior Court.

2. If collateral estoppel applies, whether the adverse action should be revoked.

Admissibility of Evidence

The issue of admissibility of the wiretap evidence in this case is governed entirely by federal statute. As described by the Court of Appeal in Bunnell, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2521) makes it unlawful for any person (including government employees and agents)

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to intercept or endeavor to intercept any wire, oral, or electronic communication "[e]xcept as otherwise specifically" permitted by other provisions of the statute. (18 U.S.C. § 2511(1)(a).) Bunnell, 21 Cal.App.4th at 1817 (citing People v. Otto (1992) 2 Cal.4th 1088). In addition, the federal law provides a "suppression sanction" prohibiting the use of evidence obtained from an illegal interception of a wire communication. Thus 18 U.S.C. § 2515 provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding entered in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. (Emphasis added).

State law also provides a suppression sanction for evidence obtained from an illegal interception of a wire communication.²

² A complete analysis of the federal statute is contained in the Court of Appeal's decision in Bunnell, *supra*. As noted by the court in Bunnell, where exclusion of wiretap evidence is required under the federal statutes, the evidence cannot be admitted under California law, because state law cannot be less protective than the federal law. 21 Cal.App.4th at 1817 (citing People v. Otto, *supra*, 2 Cal.4th at 1092, fn. 1). Therefore, it is unnecessary for us to consider whether the evidence would be admissible under state law. Accordingly, to the extent the attached Proposed Decision is based upon a finding that the evidence is admissible under state law, we do not adopt that finding herein.

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Thus, Penal Code section 631(c) provides:

Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding. (Emphasis added)).

As noted by appellant, these statutes must be distinguished from other types of exclusionary rules, such as that based on the Fourth Amendment prohibition against unlawful search and seizure. The application of such a constitutionally based exclusionary rule in an administrative proceeding requires an evaluation of policy considerations, primarily the deterrent effect of excluding illegally obtained evidence. Dyson v. State Personnel Board (1989) 213 Cal.App.3d 711, 718-719. However, such policy considerations do not apply where the basis for the claim of exclusion is not a constitutional violation but, instead, a specific statute requiring suppression of illegally obtained evidence. Here, federal and state law specifically prohibit us from considering evidence obtained in violation of the wiretap laws. While we may question the wisdom of the legislative bodies in enacting such a broad-based suppression sanction, we may not substitute our judgment for that of the legislature. People v. Otto, supra, 2 Cal.4th at 1114. Accordingly, we conclude as a matter of law that, if the evidence at issue was obtained in violation of either the federal or the state wiretap acts, it is inadmissible in this proceeding.

Collateral Estoppel

The Third District Court of Appeal and subsequent San Joaquin Superior Court rulings held unequivocally that the identical evidence sought to be admitted by the Department in this action was inadmissible in the criminal proceedings under the federal wiretap laws. The only question before us is whether principles of collateral estoppel require us to reach the same conclusion as to admissibility without affording the parties the opportunity to relitigate the issue. We conclude that we are bound by principles of collateral estoppel to refuse to permit relitigation of the issue of admissibility of the wiretap evidence, as that issue has been fully litigated by the parties, and those in privity with them, before the courts.

The doctrine of collateral estoppel provides generally that a judgment in a prior action between the same parties, even if based upon a different cause of action, "operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 253, p. 691 (citing Todhunter v. Smith (1934) 219 C. 690, 695, emphasis in quotation). A party asserting collateral estoppel must prove that the issue was fully presented to the court below and finally determined. Barker v. Hull (1987) 191 Cal.App.3d 221, 226. "When an issue of fact or law is actually litigated and determined by a

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valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Id (citing Rest.2d Judgments, § 27, p. 250).

Dyson v. State Personnel Board, supra, is closely analogous to this case. There, the court held that principles of collateral estoppel would apply to bar relitigation of the admissibility of evidence in State Personnel Board proceedings, where the evidentiary issue was decided in prior criminal proceeding against an appellant in a disciplinary appeal, under the following circumstances:

if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; if (2) the previous [proceeding] resulted in a final judgment on the merits; and if (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]. Id, at 722, citing People v. Taylor (1974) 12 Cal.3d 686, 691 and Bernhard v. Bank of America (1942) 19 Cal.2d 807, 813.

The court in Dyson had no trouble concluding that the first two prongs of this test were clearly met. Although Dyson involved application of a constitutionally based exclusionary rule, rather than the statutory rule involved in this case, once it is determined that the exclusionary rule applies, the collateral estoppel issue is identical. As in this case, at issue in both the criminal trial and the administrative hearing in Dyson was the validity of the search and seizure of evidence upon which both actions were based, and the criminal proceeding was dismissed after

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the issue of the validity of the search was fully litigated. Likewise, the issue in both the criminal trial and the administrative proceeding before us is the validity, under federal law, of the search and seizure derived from Officer Green's wiretap. Therefore, we conclude that the identical issue was necessarily decided in the criminal proceedings, and it would be futile and wasteful for the parties to relitigate it before us.

We cannot accept the Department's argument that collateral estoppel should not apply in this case because, according to the Department, issues of standing and consent were not litigated in the court proceedings. Although a former judgment is not a collateral estoppel on issues which might have been raised but were not, it is clearly a collateral estoppel on issues which were raised, "even though some factual matters or legal arguments which could have been presented were not." Bleeck v. State Board of Optometry (1971) 18 Cal.App.3d 415, 429 (citing 3 Witkin, Cal. Procedure, section 63, p. 1949, emphasis in quotation). Thus, "[c]ollateral estoppel bars relitigation of the same issues; it does not require identity of legal theories or causes of action. If it did, there would be no end to litigation for injuries arising out of the same facts, as long as a party could offer another legal theory by which the same issue might be differently decided." Evans v. Celotex Corp. (1987) 194 Cal.App.3d 741, 746-747.

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Here, the "issues" of standing and consent raised by the Department are merely alternate legal theories or arguments that could have been raised to defeat application of the federal wiretap statute to the facts of this case. We see no reason why these arguments could not have been raised in the criminal proceedings. If, as the Department asserts, the evidence would have been admissible under these theories, the Attorney General would have had an equal interest and opportunity to raise them in order to avoid dismissal of the criminal proceedings. Therefore, we conclude that the issue of admissibility of the evidence under the federal wiretap act was fully litigated in the prior proceedings, and that the parties had a full and fair opportunity to litigate all theories under which the same issue might have been decided.

Finally, we conclude that, as in Dyson, the requirement of "privity" is met in this case. In Dyson, the court found a close relationship between the significant state actors in both proceedings. In Dyson, the search was initiated by an agent of the Department of the Youth Authority who called in the sheriff, who serves as the investigative arm for the district attorney, for assistance. Similarly, the wiretap in this case was initiated by an agent of the Department who called the state's law enforcement entity, the Attorney General, for assistance. As in this case, the evidence seized by the agent of the employer in Dyson was originally retained by the agent and then turned over to the

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criminal enforcement agency, and the agent testified at the criminal suppression motion on the validity of the search. Moreover, the court noted, because a criminal conviction would have constituted cause for discipline under Government Code § 19572, subd. (k), the agency's disciplinary interest in the criminal proceeding was direct. The court further found that the district attorney in Dyson had every incentive to vigorously litigate the issue of the legality of the search, as the state agency's role as chief "accuser" was the same in both the criminal and the disciplinary proceedings. Thus, the court concluded, the litigation objectives of the criminal prosecutor and the state agency in their respective proceedings were identical. 213 Cal.App.3d at 727.

We find the reasoning in Dyson equally applicable to the facts of this case. As in Dyson, we conclude that the relationship between the Attorney General in the criminal proceeding and the Department in this proceeding was sufficiently close to warrant preclusion of the relitigation of the issue of the admissibility of the evidence under federal wiretap law in this disciplinary hearing.

In reaching our decision, we recognize that a high-level public employee will be returned to state service and will be entitled to receive a substantial award of backpay, despite the existence of relevant evidence that might have shown he engaged in

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serious misconduct. Nonetheless, we also recognize that the rules of evidence sometimes require the exclusion of highly probative evidence.³ As noted by the court in People v. Otto, it is not for us to legislate a change in the law, but rather to enforce the law set forth by the legislative bodies. On the issue of collateral estoppel, we find this case to be legally indistinguishable from Dyson v. State Personnel Board. Accordingly, we are compelled to grant appellant's motion to suppress.

Dismissal

As indicated in the ALJ's Proposed Decision and the parties' arguments, only five items of documentary evidence remain that are not covered by the superior court's suppression orders. These documents consist of a CDC Dental Operations Manual, Title 15, Section 3377, a schematic drawing of DVI, a "juice card," and an organizational chart of DVI.⁴ We conclude that the Department failed to meet its burden of demonstrating the significance of these documents in supporting the adverse action against appellant, and note that the Department does not contend that these documents

³For example, the attorney-client and other testimonial privileges exist for public policy reasons, notwithstanding the fact that they result in the exclusion of otherwise relevant and probative evidence.

⁴A sixth item, "CDC 115 re Tewksbury," is also identified by appellant as apparently not in dispute. However, there is no evidence in the record as to the relationship of this item to the charges. Therefore, we adopt the ALJ's conclusion that the Department failed to meet its burden of coming forward with admissible evidence to support the adverse action.

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alone provide a sufficient basis for holding a hearing. Therefore, in the absence of any other admissible evidence proffered by the Department, we order that the adverse action be revoked.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 19582 and 19584, it is hereby ORDERED that:

1. The attached Proposed Decision of the ALJ is adopted to the extent it is consistent with this decision;
2. Appellant's motion to suppress evidence is granted;
3. The dismissal of Michael D. Bunnell from the position of Correctional Administrator with the Department of Corrections is revoked;
4. The Department of Corrections shall pay to appellant Michael D. Bunnell all back pay and benefits that would have accrued to him had he not been dismissed;
5. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either

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party in the event the parties are unable to agree as to the salary and benefits due appellant.

6. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD*

Lorrie Ward, President
Floss Bos, Vice President
Richard Carpenter, Member
Alice Stoner, Member

*Member Ron Alvarado was not present at oral argument and therefore did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 4, 1996.

C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board

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BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)

)

MICHAEL D. BUNNELL) Case No. 31877

)

From dismissal from the position)
of Correctional Administrator)
with the Department of)
Corrections at Sacramento)

PROPOSED DECISION

A pre-hearing conference at the request of the parties was held before Eileen Gray, Administrative Law Judge (ALJ), State Personnel Board (SPB or Board) on April 24, 1995, at Sacramento, California.

The appellant, Michael D. Bunnell, was represented by Rothchild & Wishek, by Michael Rothschild, Esq.

The respondent was represented by Nossaman, Guthner, Knox, & Elliott, by Patricia Lee Connors, Esq.

Pursuant to a pre-hearing order, appellant filed motions to suppress evidence and to dismiss the adverse action. Respondent opposed the motions. Upon consideration of the motions to suppress and dismiss, the parties' briefs, and the documents and records filed in this matter, the ALJ makes the following findings of fact and Proposed Decision:

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I

JURISDICTION

The above dismissal effective August 5, 1992, and appellant's appeal therefrom, comply with the procedural requirements of the State Civil Service Act.

II

EMPLOYMENT HISTORY

Appellant was first employed with the Department of Corrections (CDC) as an Electrician in 1974. In 1989, appellant transferred to Deuel Vocational Institute (DVI) as a Correctional Administrator. In 1990, appellant was appointed to a Career Executive Assignment (CEA) and, in 1991, held the position of Chief Deputy Warden at DVI. Appellant's CEA was terminated on June 1, 1992, and he was reinstated to the position of Correctional Administrator, from which he was terminated on August 5, 1992. Appellant has no prior discipline.

III

ALLEGATIONS

As cause for dismissal, it was alleged that as a result of a joint investigation by the California Department of Justice (DOJ) and CDC, it was discovered that: 1) appellant removed and destroyed documents from inmate Barker's C-file; 2) appellant misused public funds by authorizing payment for inmate Tewksbury's dental care; 3) appellant allowed another inmate to have information about the arrangements for Tewksbury's transportation; 4) appellant condoned inmate

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violence; and 5) appellant gave favorable treatment to inmates Miranda, Tewksbury, and Barker.

These acts were alleged as legal cause for discipline under Government Code section 19572 subdivisions (d) inexcusable neglect of duty, (f) dishonesty, (o) willful disobedience, (p) misuse of state property, (q) violation of Board Rule 172, (r) violation of the prohibitions of Government Code section 19990 (incompatible activities), and (t) other failure of good behavior, on or off duty, causing discredit to the agency.⁵

IV

PROCEDURAL ASPECTS

This appeal was first set for hearing on November 10, 1992. The hearing was converted to a pretrial conference by ALJ Ruth Friedman. After the conference, the ALJ issued a Pre-Hearing Order on November 17, 1992, setting a briefing schedule for motions. The order also required CDC to file sworn declarations setting forth the direct testimony of its witnesses, and proposed exhibits with information on the witness supplying foundation for each of the exhibits. Appellant was to file counter-declarations and exhibits. The

⁵The conduct was also alleged to violate the CDC Director's Rules (tit. 15, Cal. Code Regs., secs. 3270, 3271, 3281, 3391, 3400, and 3402.) In addition, violations of Penal Code sections 72 (presenting false claims) and 135 (destroying evidence) were also alleged. To the extent that these provisions are relevant to the factual and legal allegations, they are subsumed within the charged subdivisions of Government Code section 19572. Therefore, the ALJ need not, and does not, make a specific finding whether a violation of these provisions constitutes a separate and independent legal cause for discipline.

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parties were required to file their objections, if any, to the other party's documents.

Appellant filed a motion to suppress tape recordings of telephone conversations intercepted from the phone of his clerk, inmate Miranda,⁶ based upon California Penal Code sections 631 and 632, and 18 United States Code (U.S.C.) section 2510, which prohibit electronic interception of oral communications. CDC opposed the motion. On December 10, 1992, the ALJ denied the motion on the grounds that the interception was made from an intra-institutional telephone which constituted an exception to the prohibition against wiretapping, and appellant did not have a reasonable expectation of privacy in telephone conversations with inmates. The ruling did not address the federal statute.

The parties complied with the Pre-hearing Order and submitted numerous declarations and exhibits. The November 17, 1992 Order also provided that:

"Before the date of hearing, and after the documents described above are reviewed, the ALJ will initiate a conference call with the attorneys to determine what issues require the testimony of witnesses at hearing. Witnesses will be allowed to testify on issues that remain contested, on issues which turn on credibility as determined by the ALJ, and on other issues suggested by either party."

On that same date, the appeal was calendared for hearing on January

⁶Inmate Miranda served as appellant's clerk at DVI, and as such, had a telephone in appellant's office.

20, 21, and 22, 1993.

The conference call did not occur. The matter was taken off calendar on January 11, 1993, upon the mutual request of

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the parties. Criminal proceedings involving the same allegations had been instituted in San Joaquin County Superior Court, charging appellant with misappropriating government funds for dental services for an inmate, removal of public documents, and conspiring to violate the personal liberty of other inmates. DOJ prosecuted the complaint.

In the criminal action, appellant moved to suppress evidence obtained from the interception of his telephone conversations, based upon state and federal wiretap statutes and the Fourth Amendment to the United States Constitution. The trial court rejected the People's contention that the exception under Penal Code section 631(b) for intra-institutional phone systems applied, but held that the evidence was admissible under federal law. Based upon Proposition 8 (California Constitution, article I, section 28, subdivision (d)), the motion was denied. Appellant filed a writ of mandate in the Third District Court of Appeal.

In Bunnell v. Superior Court (1994) 21 Cal.App.4th 1811 (Bunnell), the appellate court found that the trial court's order denying suppression of evidence obtained from the wiretap was erroneous. The appellate court held that the evidence was not admissible under federal law because the wiretap did not fit the exception for interceptions by law enforcement officers in the ordinary course of their duties. (18 U.S.C. sec. 2510(5)(a)(ii).)

The court also held that if the evidence was not admissible under federal law, then it could not be admitted under state law under People v. Otto

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(1992) 2 Cal.4th 1088. The court granted the writ, and ordered the trial court to "enter a new order granting the suppression motion as to the contents of the unlawfully intercepted communications and any other evidence referenced in petitioner's suppression motion which the trial court determined was derived from the unlawful interception." (Bunnell, supra, at p. 1825.)

Subsequently, appellant requested that his appeal be restored to the SPB calendar, and it was reset for hearing on April 28, 1995.

Pursuant to the parties' request, a pretrial conference was held on April 24, 1995. An Order for Pretrial Briefing was issued that date, providing that appellant was to file motions to suppress evidence and for dismissal on or before May 8, 1995, addressing the issues of:

1. The authority for a motion to suppress given ALJ Friedman's previous denial of that motion; and

2. Whether the decision in Bunnell, supra, collaterally estopped respondent from introducing any evidence in this matter. Appellant was also required to provide copies of the orders issued by the San Joaquin County Superior Court after issuance of the writ of mandate.

The Order also required respondent to brief these issues and to include an offer of proof regarding the evidence, if any, which was not suppressed by the trial court.

The parties submitted briefs and orders from the Superior Court, of which official notice was taken.

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V

FINDINGS OF FACT

Motion to Suppress

Appellant moved to suppress all evidence in the SPB hearing which was suppressed by the San Joaquin County Superior Court after remand from the Third District Court of Appeal.

The November 15, 1994 Order of San Joaquin County Superior Court Judge Stephen G. Demetras (Judge Demetras) suppressed evidence of tapes and transcripts for 22 audio cassettes, documenting conversations from July 7, 1991 to February 6, 1992 which were intercepted by the unlawful wiretap. The parties also stipulated to suppression of 56 items of physical evidence, and the testimony of witnesses derived from interception of the taped conversations. Judge Demetras accepted and approved the stipulation, stating, "The Court finds that the evidence listed in the stipulation is either the contents of unlawfully intercepted communications or is evidence derived therefrom and accordingly orders this evidence suppressed pursuant to 18 U.S.C. sections 2515 and 2518(10(a)). Whether evidence of the unlawfully intercepted communications will be admissible at trial for purposes of impeachment is to be determined by the trial court if the case proceeds to trial."

Appellant filed an additional motion to suppress the testimony of 48 other witnesses and 19 documents on November 14, 1994. That evidence was suppressed by Judge

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Demetras on February 6, 1995, based upon the finding that it was derived from the unlawful wiretap.

The People moved to dismiss the criminal complaint. The motion to dismiss was granted on February 27, 1995.

VI

Appellant's motion to suppress evidence in this action is properly before the Board. ALJ Friedman's December 10, 1992 Order was not a final adjudication of appellant's right to move for exclusion of evidence before the SPB. Code of Civil Procedure section 576 provides that a pretrial conference order may be amended in the furtherance of justice, and upon such terms as may be proper at any time before or after commencement of trial. The Board is, therefore, free to consider appellant's motion to suppress evidence.

The decision in Bunnell, supra, establishes that ALJ Friedman's denial of the motion to suppress was erroneous. The Court of Appeal made a finding of fact that the telephone was not part of a purely institutional system. That finding constitutes the law of the case, and must be applied here.

VII

Collateral Estoppel

In Dyson v. State Personnel Bd. (1989) 213 Cal.App.3d 711 (Dyson), the trial court suppressed evidence illegally seized and, as a result, dismissed the criminal proceedings. In subsequent disciplinary proceedings before the SPB, based upon the same alleged conduct, the state employer sought to

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introduce the evidence which had been suppressed by the trial court, but the evidence was admitted.

The Third District Court of Appeal held that the department and the Board were collaterally estopped to deny the constitutional invalidity of the search, reversing the SPB decision.

In Dyson, the appellate court noted that the application of collateral estoppel depends to a great extent upon policy considerations. One factor is whether application of the exclusionary rule serves the purpose of deterring the agency from invading its employee's constitutional rights. An agency is likely to be deterred if there is a nexus between the agency prosecuting the criminal action, and the agency who seeks to profit from introduction of the evidence in the disciplinary proceeding. If the relationship between the party to be estopped and the unsuccessful party in the prior litigation is sufficiently close, privity is established, and collateral estoppel may be applied to prevent relitigation of the issues actually litigated in the prior action. Before collateral estoppel is invoked, consideration must be given to whether the party's interests received adequate representation in the prior proceeding. The court noted:

"The evidence necessary to support the discipline of Dyson is that seized during the search of his house. The search was initiated and directed by the agency, the evidence was seized and held by the agency, turned over by it to a prosecutorial authority for use in a criminal action, retrieved following its suppression by the court in that proceeding, and introduced in evidence in Dyson's administrative disciplinary hearing."

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(Dyson, supra, at p. 717.)

Dyson was factually distinguished in Finkelstein v. State Personnel Bd. (1990) 218 Cal.App.3d 264 (Finkelstein). In Finkelstein, evidence sought to be used in a disciplinary proceeding was inadvertently located in that appellant's briefcase by a supervisor while preparing for an office move. The ALJ admitted the evidence at the hearing, and the proposed decision was adopted by the Board. The trial court reversed the Board decision, holding that the evidence should have been suppressed.

The Third District Court of Appeal reversed the trial court. The appellate court held that even if the search had been unlawful, suppression of the evidence was not required because the purpose of the exclusionary rule, deterrence of illegal searches, was not served. The evidence was inadvertently discovered by a supervisor who was not looking to find evidence of employee misconduct. Therefore, the agency would not be deterred in the future as it did not intend to profit from an illegal search.

Here, the evidence suppressed by the San Joaquin County Superior Court was the product of a joint investigation by CDC and DOJ. The CDC employee who placed the wiretap on appellant's clerk's telephone discussed the legality of it with a DOJ employee.

Although the initial purpose of the wiretap was to uncover criminal conduct by inmates, the wiretap was continued to conduct an investigation of appellant by CDC. This disciplinary action was taken off calendar

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because criminal proceedings commenced after the administrative hearing was scheduled, and the evidence from the wiretap was provided by CDC to the DOJ for use in the criminal proceeding.

The alleged criminal conduct paralleled the primary causes for discipline alleged in the adverse action of dismissal. The success of the criminal prosecution depended upon evidence obtained from the wiretap. DOJ had a clear incentive to fully litigate the motion to suppress. If the criminal prosecution had been successful, CDC would have obtained the benefit of appellant's conviction for the commission of three felonies. (Government Code section 19572 (k).)

Because of the close relationship between CDC and DOJ in the criminal prosecution of appellant, collateral estoppel must be applied in this administrative proceeding. The purpose of the exclusionary rule is served. The wiretap was initially placed to detect criminal activity. CDC employees will be deterred from unlawful interception of communications because they intended to use the evidence in criminal and/or quasi-criminal proceedings. Suppression denies law enforcement, CDC and DOJ, the profit obtained from illegally seized evidence so that they will not be tempted to violate the law in future investigative efforts. There was nothing inadvertent in CDC's and DOJ's collection of evidence against appellant. Therefore, respondent is collaterally estopped

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from denying the illegality of the evidence obtained from the wiretap which was suppressed by the trial court.

VIII

Evidence Removed from the Primary Taint

Respondent was directed to set forth evidence not covered by the San Joaquin County Superior Court's suppression orders which supported the charges alleged in the notice of adverse action. After the appellate court decision in Bunnell, supra, the Superior Court Orders excluded a vast amount of physical evidence and a large number of witnesses. Appellant prepared a chart indexing each item of suppressed evidence to the offer of proof submitted by respondent pursuant to ALJ Friedman's order of November 17, 1992. Appellant asserted that all 51 witnesses named by respondent, and 34 exhibits were covered by the Superior Court Orders.

Respondent did not dispute appellant's argument. It countered that while some witnesses were covered by the Superior Court Orders, the witnesses could provide testimony that was tangential to the criminal counts, and therefore should be heard in the administrative proceeding. This assertion is negated by Dyson, supra, however. The Superior Court Orders suppressed the evidence at issue here based upon its illegality, not its use. That determination is binding upon CDC in this proceeding.

Appellant and respondent identified a CDC Dental Operations Manual; a copy of Title 15, section 3377; a schematic drawing of DVI; a DVI organizational chart; and a

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juice card as not covered by the Superior Court Orders. Respondent did not provide an offer of proof regarding this evidence or explain its significance in supporting the dismissal of appellant.

It identified the substance of the evidence only as "Not alleged to be barred." CDC had the burden of demonstrating that this evidence was not tainted by the illegal wiretap. Its failure to provide an offer of proof regarding these five documents does not meet that burden. This evidence, therefore, is suppressed.

IX

Motion to Dismiss

Government Code section 19582 (a) provides that during a hearing, after the appointing authority has completed the opening statement or its case in chief, the appellant may move for dismissal of the charges. If the evidence supports the motion, it may be granted.

Respondent presented a written opening statement to ALJ Friedman along with its declarations and exhibits. Appellant's motion to dismiss the adverse action is properly before the board.

Given that all evidence heretofore identified by respondent has been suppressed by the law of the case in Bunnell, supra, the Superior Court Orders, collateral estoppel under Dyson, supra, and respondent's failure to meet its burden of producing admissible evidence, further proceedings in this case would be an idle act. Therefore, appellant's motion to dismiss the adverse action is granted.

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PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Appellant's motion to dismiss the evidence identified in the San Joaquin County Superior Court Orders is granted based upon Bunnell and Dyson, supra. Because respondent has not shown that it has any other evidence relevant to the charges, appellant's motion to dismiss the notice of adverse action of dismissal is also granted.

* * * * *

WHEREFORE IT IS DETERMINED that the dismissal of appellant Michael D. Bunnell, effective August 5, 1992, is hereby revoked. Said matter is hereby referred to the Chief Administrative Law Judge, and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary, interest, and benefits, if any, due appellant under the provisions of Government Code section 19584.

* * * * *

(Bunnell continued - Page 15)

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: September 11, 1995.

EILEEN GRAY
Eileen Gray,
Administrative Law Judge,
State Personnel Board.